Are (Palestinian Authority's) Legislated Statutes Substantially Different from (Israeli) Military Orders?

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Are (Palestinian Authority's) Legislated Statutes substantially different from (Israeli) Military Orders?

Asem Khalil*

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I. Introduction

During Second World War, Lord Atkin famously contradicted Cicero's 2000-year-old dictum (*Silent enim leges inter arma*),[1] when he said: "In this country, amid the clash of arms the laws are not silent. They may be changed, but they speak the same language in war as in peace."[2] In contemporary states, it is rare to rule by brutal force, even in times of emergencies, threats to national security, or even in times of occupation of an alien population. Israel indeed ruled West Bank and Gaza Strip using law and legality. Changes to local Palestinian legal and judicial systems were often introduced through military orders.

In this paper I discuss the nature and role of rules by legislated statutes, enacted by the Palestinian Authority since its establishment in 1994, and the rules by military orders, enacted by Israel since its occupation of the West Bank (including East Jerusalem) and Gaza Strip since 1967. I investigate on the difference between both enactments, their place within the legal system of the occupied Palestinian territory, and their contribution into framing and

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[1] Quoted in: (Barak 2003, 130).

[2] Quoted in: (Lowry 1992, 119). For a discussion, *see generally* (Dyzenhaus 2004).

limiting state's exercise of power over the population under its jurisdiction. Indirectly, but inevitably, this paper will give an insight on the difference that exists between the law produced by a *national* law giver and the law produced by an *alien* law giver.

To make my case simpler, I imagine a Palestinian judge,[3] in the court of Ramallah in 1968, one year after the Israeli occupation of the West Bank, who needed to rule whether to accept the claim of the plaintiff, based on a military order, or the respondent opposite claim, based on a rule present in a Jordanian law. If he admits that rules contained in military order are rules of law, then the second question would be whether he is under the moral obligation to apply the military order.[4] I then imagine the same judge in 1997, three years after the establishment of the Palestinian Authority, having to rule a similar case without any legislation, yet, from the Palestinian Authority. What to do?[5] The list of cases in which the legality of legislated enactments may be under question may continue.[6]

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[3] In this paper it is not my concern to discuss whether there would be enough reasons for an individual to consider those enactments as law, and whether, based on his personal judgment and conviction, he will feel obliged to obey that law. In such an enterprise, any theoretical construction without the support of empirical data would be at best useless and at worse misleading. Rather in this paper my concern goes to those officials, who need to decide in concrete cases what the law is and whether they are under the moral obligation to obey it. Similarly, a lawyer, approached by a client, is going to ask the same questions. Most importantly, it is often the case that the attitude of both judges and lawyers towards the law, mainly in the administration of justice, is often given a value that transcends specific cases, and the individual rules. Their fidelity to law may be considered at best as recognizing certain rules as being valid law, or, at worse as legitimating an evil legal system.

[4] Less than one year after Israeli occupation of West Bank and Gaza Strip, Palestinian judges had to deal with such questions. In an interesting article in 1968, Yehuda Z. Blum discussed the two decisions handed down (on February 5, 1968) by the Hebron magistrate Mr. Hussein El-Shajuchi, and (on February 27, 1968) by Bethlehem magistrate, Mr. Tawfik El-Sakka. The former have rejected to apply Order No.145 of 1967 concerning the status of Israeli advocates in the courts of Judea and Samaria, while the second magistrate reached the diametrically opposed legal conclusion concerning the validity of Order No. 145. For a discussion of those two cases, *see* (Blum 1968).

[5] The Palestinian Appellate Court of Ramallah had to deal with such a question, in the case 809/97, issued on November 17, 1998, rejecting the appellant argument against the application of Military Order n.771 of 1978 on the case. The Court held that military orders that established legal positions and accumulated rights remain in force until duly abrogated. Similar conclusion was reached earlier, on September 14, 1998, by the same court in decision 634/97, in which the court rejected the arguments advanced by the judge of first instance, in which he rejects the application of Military Order no.1271.

[6] I can for example imagine the same long lived judge deciding a case in 2005, this time with a legislated statute by the Palestinian Legislative Council, an elected body for the Interim period, which was supposedly to be over already since 1999. In 2008, I imagine him in need to decide cases in which the concerned statute is effectively legislated by presidential decree. Although I do not have found cases in which such questions are decided, it is often the case that public discussion had reached, not only the status of legislation enacted by the Palestinian Authority after the end of the Interim period, but also the status of the Palestinian Authority itself. Similar discussion regarding the legality of rule by decree since 2007 by Palestinian Authority's President and his nominated technocrat government is increasingly questioned.

Writing about the substantial differences between the Palestinian Authority legislated statutes and the Israeli Military Orders is not an academic exercise; a luxury enterprise, superfluous or unnecessary in the current state of affairs of the occupied Palestinian territory. On the contrary, it is a legal and moral concern that each judge or jurist needs to deal with at a certain point of his career. It is an inquiry in the legal character of the rules included therein and the attitude one ought to have towards them. In other words, I make two different, but completely interrelated, questions: First, do rules included in both enactments constitute rules of law? Second, if yes, is there any moral obligation to obey those rules?[7] The following sections will not provide one unique answer to the above questions. The nature of the rules included in those enactments will largely depend on the concept the judge has of law. At the same time, the characterization of those rules as law, or the denial thereof, will have repercussions on the attitude towards those rules.

I will first exclude possible narratives and suggest the Rule of Law as a paradigm for testing both enactments (Section II).[8] I will then provide different conceptions of the Rule of Law that takes the way rules are created and applied as their basis; i.e. the formal conceptions of the Rule of Law (Section III). Being a multifaceted political ideal,[9] the Rule of Law provides different sets of criteria on the way law ought-to-be, upon which it is possible to test both enactments (Section IV). I will suggest that a formal conception of the Rule of Law is not enough (Section V). It is only through substantial conceptions of the Rule of Law in which freedom and rights are part of what the law is, can provide a distinctive character of legislated statutes from military orders (Section VI). I will conclude by arguing that legislated statutes constitute a sine qua non for the Rule of Law (substantially conceived), but, legislation alone, does not necessarily lead to that political ideal (Section VII).

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[7] A third question is haunting judges and lawyers when dealing with unjust laws, as a "specter" – to use the same word of the editor of Law and Social Inquiry, Stephen Ellmann (Ellmann 1995, 339) – because they find themselves often using the terms of laws they despise. Although of great relevance, I will not deal with the impact of the application of judges and lawyers to military orders, beyond what I refer to in later stage as recognition of them as valid rules of law (in the Hartian sense). It is a different issue whether recourse to law under occupation should be interpreted as having a legitimating force. I tend to disagree with such an approach, although much more is still needed to support this claim, but which goes beyond my concern in this paper.

[8] I will capitalize the Rule of Law to distinguish it from a rule of law, which typically refers to a particular legal rule, that can have different sources, included a legislative statute or a military order. For a discussion about the difference between rules and law, *see generally* (Schauer 1991).

[9] (Waldron, The Concept and the Rule of Law 2008, 6).

II. Why they are Different (and why do I ask)?

It may be argued that what seems *prima facie* to distinguish between both kinds of enactments is the participation or the absence of the governed themselves in the process of law making. Palestinians indeed were simply recipients of Israeli enactments or fiats, unilaterally adopted and vertically imposed on them. In the case of legislated statutes on the other hand, enacted by a legitimate national authority and by an elected body, Palestinians are somehow participants in the process of law making. In this account, it is the participation of the ruled themselves in the process of law making that makes the rule by legislated statutes substantially different from the rule by military orders. Democracy and democratic institutions, in other words, distinguish between both legal enactments.

This kind of argument is misleading, though. In fact, the above premises may serve to postulate a second conclusion, almost inevitable, i.e. in case of deficiency in the participation of the governed in the law-making process, the rule by statute by a national authority, would not be substantially different from a rule by milبشؤitary orders by an alien authority. Accordingly, there would be no substantial difference between rules set up by a non-democratic national regime and rules set up by alien authority, whether colonial or occupation authorities. This conclusion is somehow disturbing, but it is also contrary to the way international law deals with occupation on the one side and undemocratic regimes on the other. Most importantly it means that it cannot be ruled out, *a priori*, whether or not rules by statutes are substantially different from rules by military orders, because one should first assess whether the law giver, in the case of a national authority, is the legitimate authority to make law. It is also impossible to rule out a priori what constitutes enough level of participation of the governed in the process of law making.

A second approach is possible; an approach that uses the goals targeted by the enactments as a criteria of differentiation, rather than the authority of their creator. Here, the law is a tool, not an objective; and the law-making is nothing else but the machinery for politics (as a result of the will or interests of the law giver) to take control of subjects within the jurisdiction of the existent regime. The difficulty with this approach is that it takes the discussion to a different level without necessarily helping us determine whether the rule by legislated statutes and the rule by military order are substantially different. In both cases, indeed, the enactments are perceived as tools towards certain objectives; both may be

accordingly evaluated and tested based on agreed standards or criteria. Such standards may include, but not limited to, whether the rules served the interest of the governed, or served as a colonial tool, for example.

While it is not excluded that the rule by legislated statutes would result to be different from rule by military orders, such an approach may not help to conclude definitively that the opposite postulation is excluded *a priori*; rather, this approach will be inclined to suggest a case by case analysis, where each statute and each military order needs to be scrutinized according to the agreed upon standards. The perplexity then will be to find out that some of the military orders really served the local population interest, and that some statutes are not adopted to serve national interests. In both cases, it cannot be ruled out a priori what the national interest is. This will lead us to conclude, that such an approach is unable to differentiate substantially between rules by statute, and rules by military orders.

A third approach is possible, an approach that looks at the way certain individuals exercise governmental power over individuals. Governing by rules rather than coercing by applying brutal force may differentiate between both enactments. The advantage here is that the law has certain objectivity, regardless of the authority of its author, and regardless of the objectives or goals it may be targeting, or the interests they may be serving. The disadvantage is that it cannot provide a differentiating tool, since it is absolutely rare, in times of occupation and even in times of colonization, to govern exclusively by applying brutal force. The recourse to law and legality serve even in those extreme cases to facilitate governability of the population, and reduce its cost.[10] Israel indeed used military declarations and orders to rule the territories occupied in 1967 (or to use Israeli term, to 'administer the areas under its control').[11] This means that in both cases, in fact, the effective authority used rules to govern the population under its control, rather than brutal force (or at least reduced to the bare minimum the areas where brutal force is applied). Accordingly, this approach, despite its

[10] The recourse to legality does not necessarily have a legitimating objective but may simply serve other objectives, such as the rationalization of oppressive policies where law is used to realize colonial projects, but also reflects the need of maintaining internal cohesion and morale or gain international approval for their policies. *See* (Bisharat, Land, Law, and Legitimacy in Israel and the Occupied Territories 1994, 468-71). For Yuval Shany law serves as a discourse "[g]iven that law is generally respected in Israel." (Shany 2008, 7).

[11] As pointed out by Yuval Shany the fact that Israel is generally committed to the rule of law in its internal affairs, adds another important dimension to the assessment of the utility of the legal discourse in occupation-related matters." (Shany 2008, 7).

attractiveness will not provide adequate tool of differentiation between legislated statutes and military orders.

While assessing that there seems to be a tacit assumption that Israeli military orders are substantially different from the Palestinian Authority legislated statutes, the above examples show that there can easily be a disagreement about *why* this is so. Most importantly, there appears to be no interest in the literature to distinguish between both kinds of legal enactments. The fact that we assume it, rather than try to explain it, is significant. It may be explicable in two different ways: First, it is possible that for many people this may seem simply obvious to the point that explaining it may be considered merely a superfluous academic exercise. ("For God's sake," they may say: "How can the military order of an occupying power not be different from a statute created by a nationally and legitimately elected body?") Accordingly, they simply assume that they are different, without further explanation. Second, others may be skeptical about the whole enterprise, *ab initio*, because differentiating between statutes enacted by a national authority on the one side and military order enacted by an occupation authority on the other side may suggest –indirectly but inevitably – that since comparable, they share a minimum of characteristics that justified the comparison at first place.

My postulation in this paper is that the assumption about existence of a substantial difference between the two legal enactments is correct. My objective is to provide an account of the reasons *why* they are so. The (hopefully plausible) claim I make in this paper is that it is possible to distinguish between the rule by legislated statutes and the rule by military orders by making reference to the ideal of Rule of Law, as an ought-to-be law, which is, in my account, strictly connected to the concept of law, concerned with the nature of law itself, i.e. to what makes a law, at first place, law.[12] Before that; however, let me set up the terms of my enterprise, which serve as premises for the arguments I intend to make in later stages.

First, in this paper, I depart from an understanding of both statutes and military orders in a very neutral way. For me they both represent: (1) legal enactments at a specific historical moment (accordingly I exclude any reference to rules that emerged over time, with the

[12] The fact that I connect the Rule of Law as an ideal to the concept of law means that I agree with Waldron's proposition that both indeed need to be grasped together, and that "we cannot really grasp the concept of law without at the same time understanding the values comprised in the Rule of law." (Waldron, The Concept and the Rule of Law 2008, 10).

possible contribution of the judiciary or the administration itself) (2) by a law-giver (regardless of who is the law-giver, whether a national or alien authority) (3) aiming at creating new norms (regardless of the content of those legal norms) which are (4) enforced by the authority having an effective or at least the minimum of control over certain territory and certain populations (regardless of the goals they may be implicitly or explicitly willing to achieve).

Second, my account is based on a distinction that I draw between rule *by* and *through* law on the one side, and the Rule *of* Law on the other.[13] While the first two are essential for the latter, if they are taken alone, this paper argues, the rule *by* and *through* law may lead to what is the complete opposite of the Rule of Law. This distinction will serve in later stages to distinguish between what I perceive to be Hart's position of a legal system which exists regardless of the inner morality of the law; while Fuller claimed that it is a sine qua non for a legal system to exist at first place.[14]

Third, while claiming that the Rule of Law provides a valid (paradigm for understanding and a valid) tool for differentiating between rule by legislated statutes and the rule by military orders, I do not argue that the establishment of the Palestinian Authority had automatically converted the legal system to a Rule *of* Law. Accordingly my point of departure is a

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[13] The rule *by* law means that the government itself subjects its will power to the constraints of the law and the rule *through* law means that the acts of domination must acquire the form of the law. For Preuss, those are the "twofold meaning" of the rule of law. (Preuss 1996, 16). However, as rightly pointed out by Jeffrey Kahn, the rule *by* law and the rule *through* law describe a political system in which statutes and other legislation are the supreme authority in the state by virtue of adherence to a formal legislative process of passing statutes and other legal acts." (Kahn 2006). For him, this system represents a *Rechtsstaat* but not a rule of law. In this paper we adopt a concept of the rule of law similar to Kahn, not Preuss. To my understanding, early positivist, such as the eighteenth century utilitarian theorist and reformer, Bentham, would have individualized principles needed for controlling the abuse of power. Hart for example believed that in Bentham work it is possible indeed to identify the elements of *Rechtstaat*. For him, those principles are now revived by natural law theorists (Hart 1958, 595).

Accordingly, it is possible to conclude that the rule of law goes beyond the limits imposed by the state itself in the way it makes laws, execute them, or apply them. In such a system, "the state is not the sole source of law and adherence to procedural formality is necessary but not sufficient for law to be made." (Kahn 2006, 364). This is why the evaluation I will make to both military orders and statutes is not done based on constraints imposed by the law giver itself in the way he decides to make law, execute and apply them, but rather on the basis of principles (or sets of principles), individualized to be forming the meaning of the phrase "rule of law".

[14] See the famous debate of Hart and Fuller on Harvard Law Journal, (Hart 1958); (Fuller, Positivism and the Separation of Law and Morals - A Reply to Professor Hart 1958). John Quigley for example used Fuller's argument to argue that the Israeli military government of the occupied Palestinian territory, although used legality, cannot be considered as a legal system proper, but rather "a set of arbitrary rules" (Quigly 1981, 119).

distinction between the legal system on the one side, that can exist in any system (i.e. a system of that use law to rules to govern), and on the other side, the rule-of-law legal system.

III. What is (Rule of) Law?

I do not pretend to give an exhaustive answer to what the Rule of Law is (Nobody does!) or even to what the law is; there are indeed different approaches to and different conceptions of the law. In what follows I will provide two sets of principles that stand in completely opposite extremes; the first is held by legal theorists that are often grouped under the umbrella of legal positivism, with special attention to Austin, Kelsen and Hart (that I will call, for an issue of convenience, "Rule of Law tout court"), and the second is held by Fuller, and his insistence on the inner morality of law (that I will call, "Rule of Law as legality"), completed by Waldron's insight (that I will call, "Rule of Law as procedure").

In Austin positivism, law is a phenomenon of large societies with a sovereign (that can be one person or one group) who have supreme and absolute *de facto* power. Accordingly, law is nothing else but the sovereign command backed by threat of force or sanctions. Austin's sovereign seems to be the Leviathan of Hobbes, who is not Subject to the Civil Laws, since he has the power to make, and repeal such laws.[15] This means that law is law, regardless of the existence of a moral right to rule or whether the commands are meritorious.[16] As much as there is a sovereign, there is unity, and accordingly, there is a legal system.

Kelsen and Hart instead maintained that law is normative and must be understood as such.[17] For the unity of the legal system depended not on the imperative character of rules and their connection with a sovereign's command, but rather in their linkage to each other.[18] Kelsen and Hart differed in the way they explained this linkage. For Kelsen, each rule is linked to another, in one chain of authority.[19] Hart considered law as the union of primary and secondary rules.[20] At certain point the inquiry regarding the linkage of norms, Kelsen stops

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[15] (Hobbes 1904 (1651), 190). *See generally* chapter 26 of Hobbes' Leviathon.

[16] (Green, Legal Positivism 2003).

[17] (Green, Legal Positivism 2003).

[18] For Kelsen, "[l]aw is not, as it is sometimes said, a rule. It is a set of rules having the kind of unity we understand by a system. It is impossible to grasp the nature of law if we limit our attention to the single isolated rule." (Kelsen 2007(1945), 3).

[19] (Green, Legal Positivism 2003).

[20] (Hart, The Concept of Law 1961, 77-96)

and presupposes a (hypothetical) "basic norm". Such a norm, because foundational, is not a legal norm, and cannot be social fact (no "ought" from "is").[21] It is that last assertion that Hart rejects. Hart indeed seems to favor an empirical view of rules, rather than a transcendental one. For him, the ultimate criterion of validity in a legal system is social (secondary rules) that exists only because it is actually practiced (according to the rule of recognition).[22]

If we pose the above two questions to Austin, Kelsen and Hart, what tips can they provide him to proceed with his investigation? On the issue of the nature of the rules included in those enactments, I take Austin to be interested in checking out whether or not military orders and legislated statutes are the commands of the sovereign, backed with the threat of sanction. On the contrary, I take Kelsen to insist on investigating whether those enactments are issued by an authorized law-giver according to superior norm. Finally, I take Hart to be interested on investigating whether those enactments (containing primary rules) are coherent with the secondary rules, practiced and recognized as such by the officials.

As for the second question, I believe the answer would be unanimous in refusing to rule out any moral obligation of obedience or disobedience. They may even agree on the possibility of having a moral obligation to disobey evil laws, but the core issue for them will still be the same: Law is separated from morality. However, as it least well pointed out by Hart, the separation theory need not to lead to the trap of legalism,[23] in which the insistence on the separation between law and morality is simply exploited to realize evil objectives, thus refusing criticism of bad laws in the name of "law as law". In any case, for legal positivists, I take them to insist, the fidelity to law is different from the nature of law, because law is separated from morality. Accordingly, a rule may fail the test of morality, but is still a rule of law.

The other extreme position on the spectrum is the one defended fiercely by Lon Fuller, who revived the tradition of natural law. For him, a rule that does not pass the test of legality is not a legal rule. Legality of rules depends on satisfying eight principles that Fuller individualized: law ought to be general, publicly promulgated, prospective, intelligible,

[21] (Green, Legal Positivism 2003).

[22] (Green, Legal Positivism 2003).

[23] *See generally* (Green, Positivism and the Inseparability of Law and Morals 2008).

consistent, practicable, not too frequently changeable, and actually congruent with the behavior of the officials of a regime.[24] A similar list is present in John Finnis writings, although with different order,[25] as much as in the writings of Joseph Raz.[26]

For Fuller, those principles constitute the *inner* morality of law. Since law is not separated from morality in Fuller's account, an immoral law is not law at all. It is "morality that makes law possible",[27] because "[t]o command what cannot be done is not to make law; it is to unmake law, for a command that cannot be obeyed serves no end but confusion, fear and chaos."[28] It is not surprising then, based on that rationale given by Fuller of his eight principles, that other scholars reduced his list to one basic idea (law should be capable of providing effective guidance, such as in Joseph Raz[29]) or two (there must be rules and those rules must be capable of being followed, such as in Margaret Radin[30]).[31]

As a logical consequence of the second sets of principles, Waldron suggests to give due consideration of the way law is enforced on concrete cases. Simply stated, it means that law will be enforced exactly in the same way it was intended originally; thus individuals guided by rules, will not fall in the trap of law. In other words, once conflicts arise, justice will be administered impartially, and parties in conflict will not be disappointed by enforcing on them a law that is different from the one that have guided their actions at first place. Waldron suggested calling them procedural principles, as complementary to Fuller's principles,[32] that Waldron considers as being rather formal and structural in character.[33]

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[24] (Fuller, The Morality of Law, Revised Edition 1969, 43), (Waldron, Is the Rule of Law an Essentially Contested Concept (in Florida)? 2002, 154).

[25] (Finnis 1980, 270), cited in: (Waldron, Is the Rule of Law an Essentially Contested Concept (in Florida)? 2002, 154).

[26] (Raz 1979, 214-9).

[27] (Finnis 1980, 41).

[28] (Fuller, The Morality of Law, Revised Edition 1969, 37).

[29] (Raz 1979, 218), cited in: (Waldron, Is the Rule of Law an Essentially Contested Concept (in Florida)? 2002, 154).

[30] (Radin 1989, 785).

[31] For a discussion of those different views, see: (Waldron, Is the Rule of Law an Essentially Contested Concept (in Florida)? 2002, 154-5). I believe that those who try at any cost to interpret Fuller account *positivistically* miss the essential point that law is and cannot be separate from morality.

[32] (Waldron, The Rule of Law and the Importance of Procedure forthcoming 2010). Waldron even tried to individualize eight 'laundry list' that correspond to Fuller eight principles, a hearing by an impartial tribunal; a legally-trained judicial officer; a right to representation by counsel; a right to be present at all critical stages of

In my account, despite being separated apart from Inner morality of law, Waldron's Rule of Law as Procedure are simply fuller's other face of the coin, at least when Waldron consider those procedural principles as forming part of the formal conceptions of the Rule of Law. If, instead, Waldron perceives those procedural principles as requiring something 'substantive', such as fairness and non-arbitrariness, they may be in tension with the ideal of Rule of Law as legality, because they go beyond the formal aspect of rules and the way they were enacted.[34] Waldron himself refers to Dicey's account of the Rule of Law as portraying both the emphasis on the normal operation of the ordinary courts, as much as on the characteristics of the norms they are administered.[35]

If we pose the same two questions to Fuller and Waldron, what will be their insights? I take Fuller suggesting the need to check out whether the concerned rules pass the test of legality (the eight principles of the inner morality of law). If they do, then they are moral, and accordingly, they are law; if they don't, then they are not law at all. Waldron would not be satisfied by this inquiry alone. He would rather suggest continuing the inquiry on the way justice is administered. In case of moral law, there is no way to escape the simple conclusion that there is a moral obligation to obey moral law.

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the proceeding; to confront witnesses against the detainee; to an assurance that the evidence presented by the government has been gathered in a properly supervised way; to present evidence in one's own behalf; to make legal argument about the bearing of the evidence; to hear reasons from the tribunal when it reaches its decision; and finally some right of appeal to a higher tribunal of a similar character.

[33] (Waldron, The Concept and the Rule of Law 2008, 7).

[34] Waldron himself admits that: For the most part, there are two currents of thought sit comfortably together. They complement each other. Clear, general public norms are valueless if they are not properly administered, and fair procedures are no good if the applicable rules keep changing or are ignored altogether. But there are aspects of the procedural side of the Rule of Law that are in some tension with the ideal of formal predictability. The procedural side of the Rule of Law presents a mode of governance that allows people a voice, a way of intervening on their own behalf in confrontation with power. It requires that public institutions sponsor and facilitate reasoned argument in human affairs… By emphasizing the legal process rather than the formal attributes of the determinate norms that are supposed to emerge from that process, the procedural aspects of the Rule of Law seem to place a premium *on values that are somewhat different from those emphasized in the formal picture*." (Waldron, The Concept and the Rule of Law 2008, 8) (Emphasis added). Since I will dedicate a section for substantive conceptions of the Rule of Law, I will refer to Waldron's insight in sections III and IV as being complementary to Fuller's Rule of Law as legality. It should be noted however, that Waldron had identified some features that are not being substantive features, because they simply related to characteristics that define "a mode of governance that takes people seriously as dignified and active presences in the world." (Waldron, The Concept and the Rule of Law 2008, 40).

[35] (Waldron, The Concept and the Rule of Law 2008, 7).

IV. Testing Legal Enactments

There are different examples in the literature that show how Israeli military orders fail the test of legality, based on one of Fuller's desiderata.[36] It is true that Fuller himself admits that the eight desiderata work as a system and, accordingly, he seems to agree that it is a matter of degree. However, in Fuller's account, some are more important than others, such as public promulgation for example.[37]

John Quigley since 1981 – reviewing Shehadeh's book on Israeli military orders applied in the West Bank– made explicit reference to Fuller principles, especially the one that states that a law ought to be publically promulgated.[38] In fact Quigely was fascinated by the book's revelation that "texts of the military orders that constitute legislation in the West Bank are inaccessible to the public and available only on a limited basis to practicing lawyers".[39] Similar reaction appears in the forward made to the same book by Niall Macdermot, Secretary-General of the International Commission of Jurists.[40] This does not mean that Israel was not "legalistic"[41] or "legalized"[42]; on the contrary. It is often the case that Israel's

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[36] It can be argued for example that Israeli military orders imposing and institutionalizing discriminatory practices vis-à-vis local Palestinian population, and applying dual system of law directed towards local population on the one side, and Israeli settlers on the other (Shehadeh, Occupier's Law: Israel and the West Bank 1988, 63-75). Israel also issued thousands of military orders and changed constantly the law, thus failing the principle of constituency and the stability of law. It is also by military orders that settlers were exempted from the Palestinian courts' jurisdiction. In 1980s, Israel established "municipal courts" for each settlement, rendering the settlers also *de iure* excluded from Palestinain courts' jurisdiction. *See* (Kassim 1984, 32). Through Oslo agreements, Israel and the PLO agreed to limit jurisdiction of the Palestinian Authority, excluding jurisdiction over Israeli citizens (*See* article XVII of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 1995). Concerning legal status of Israeli settlers, *see generally* (Quigley, Living in Legal Limbo: Israel's Settlers in Occupied Palestinian Territory 1998).

[37] (Waldron, Is the Rule of Law an Essentially Contested Concept (in Florida)? 2002, 154).

[38] (Quigley, Review: West Bank: Israel's Abuse of Law 1981, 119).

[39] (Quigley, Review: West Bank: Israel's Abuse of Law 1981, 118).

[40] "There have been isolated cases, as in Chile, where one or two decrees of a military government have been treated as secret documents and not published. However, this is the first case to come to the attention of the International Commission of Jurists where the entire legislation of a territory is not published in an official gazette available to the public." Quoted in: (Shehadeh, The Legislative Stages of the Israeli Military Occupation 1992, 151).

[41] Shehadeh for example argued that: "Israel's occupation has been legalistic" (Shehadeh, Occupier's Law: Israel and the West Bank 1988, vii). "Israeli pronouncements have tended to be very legalistic, using expedients common to the craft of lawyers." (Shehadeh, Occupier's Law: Israel and the West Bank 1988, 4). George Bisharat argued: "Israel has since 1967 administered the West Bank and Gaza Strip through highly legalistic and strongly repressive military governments." (Bisharat, Courting Justice? Legitimation in Lawyering under Israeli Occupation 1995, 349).

policies in the West Bank and Gaza Strip passed through legal or legal-like enactments.[43] This explains the thousands of military orders adopted separately for both West Bank and Gaza Strip, in the first place. In this sense, Israeli rule was not different from colonial societies characterized by the reliance on law.[44] Based on the Rule of Law as Legality, military orders that do not pass the test of legality are simply not law at all. To Fuller's discontent, Hart was right.[45] The inner immorality of certain military orders changed nothing in practice to its being applied by courts, and continually enforced (Austin's trilogy of sovereign, command, and sanction are satisfied present). Most importantly, it is difficult to imagine the opposite, since all Palestinian judges since 1967 (until the establishment of the PA) were appointed by, and receive their salary from, the Area Commander,[46] and their functions are exercised under the supervision of the (Israeli) officer in charge of the judiciary.[47]

As rightly pointed out by Hart, rules of law, as separate from morality, should not be confused with the commands theory.[48] For Austin indeed, it is possible that he would conclude that the Israeli Area commander – although subordinate to Israeli Military Defence Minister, and to certain limitations imposed by Israeli legal system as such (under the last scrutiny of the Israeli Supreme Court)[49] – has in fact sovereign power; maintaining the effective control of the areas, he is deemed as the supreme power. Accordingly, military orders are simply the command of the sovereign, backed by the threat of sanction. Hart nonetheless differentiated between the two doctrines of the early positivists, Austin and

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[42] Yuval Shany noticed that one of the characteristic of Israeli occupation of West Bank and Gaza Strip is that it is "exceptionally legalized" (Shany 2008, 7).

[43] As pointed out by Anis Kassim: "By virtue of these Orders, Israel has changed, amended or repealed virtually every piece of legislation in these two parcels of Palestinian territory. These changes, primarily designed to serve the expansionist policies of the occupying power, have adversely affected, in turn the legal system, the judiciary and the law enforcement agencies in the Occupied Territories." (Kassim 1984, 30). For more about the Israeli changing modes of power and policies in the occupied Palestinian territories that go beyond the political proclamations, in which there was an attempt to expropriate the occupied land without fully annexing it (with the exception of East Jerusalem, which was officially annexed by Israeli Knesset, although deemed contrary to international law of occupation), *see generally* (Gordon 2007).

[44] *See* (Bisharat, Land, Law, and Legitimacy in Israel and the Occupied Territories 1994, 496)

[45] (Hart 1958), making reference to Austin argumentations in favor of the separation between law and morality.

[46] (Shehadeh, Occupier's Law: Israel and the West Bank 1988, 77).

[47] (Shehadeh, Occupier's Law: Israel and the West Bank 1988, 76).

[48] (Hart 1958, 601)

[49] About the jurisdiction of the Israeli Supreme Court in its capacity of High Court of Justice, *see generally* (Farrell 2002-2003, 879-81); (E. R. Cohen 1986); (Weiner 1995).

Bentham: the first doctrine is epistemological and related to the way one can trace the law, its source, and the second one is ontological, related to the nature of law. Hart then rejected the command theory, without, for that same reason, scarifying what he considers the pillar of legal positivism that is the separation between law and morality.[50]

In support of the positivist approach using "Rule of Law tout court", one can cite the simple fact that since the 1980s, Israel made a considerable effort to make those military orders available.[51] Many were still unavailable and unpublished, but the issue is that many deficiencies from the perspective of the inner morality of law could be accordingly ameliorated, and Fuller would be incapable of denying the legal character of an evil law, whenever his tests of legality are respected. The fact that many Palestinian judges and lawyers adopt the second approach (thus applying Israeli military orders) may constitute for a Hartian jurists to claim that there exist even a rule of recognition. Such judges and lawyers in fact seem to depart from the simple fact that the effective authority is Israel, as occupation authority, and sometimes Palestinian judges had to deal with those military orders.[52]

The hierarchical connection between rules, until a basic rule, according to Kelsen version, seems to be also possible to individualize. Israeli military occupation, according to a Kelsenian jurist, had created a new fact, that a jurist is not responsible of discussing, but simply observing as a matter of fact. This is what I understand from the insistence of Meir Shamgar (by then the Military Advocate General) on that the "proclamation [No.1 of 1967] was not constitutive but only declaratory."[53] In other words, with the Israeli Army entrance into the West Bank and Gaza Strip, what changed was simply the basic norm, the foundation of the new legal system. Such a view will deal with military orders as valid law as much as

[50] For Hart a legal system according to Austinian trilogy (command, sanction, and sovereign) is assimilated to a gunman saying to his victim, "Give me your money or your life." Then he simply argued that "[l]aw surely is not the gunman situation writ large, and legal order is *surely* not to be thus simply identified with compulsion." (Hart 1958, 603).

[51] "In 1982, fifteen years after the beginning of the Israeli occupation, the mitliary orders were finally published in their totality. Many of the secondary regulations as well as a number of orders made by virtue of the published orders, still remain unavailable." (Shehadeh, The Legislative Stages of the Israeli Military Occupation 1992, 151-2).

[52] The West Bank attorneys, immediately after the beginning of the occupation, went on strike, "refusing to litigate in court while the Israeli army controlled the West Bank. Gradually, however, most have taken up law practice again." (Quigley, Review: West Bank: Israel's Abuse of Law 1981, 121).

[53] (Shamgar 1982, 14). For more about the way Israel assumed powers in the areas under its control, *see* (Farrell 2002-2003, 876-8).

they are linked to superior norms and adopted according to the criteria and authority set up by that norm.[54] This explains also why State's attorneys justify Israel's actions in the territories that restrict the rights of Palestinians on the basis of the law of occupation, while at the same time consistently argue that the West Bank and Gaza Strip are not occupying territory.[55]

It seems that the discussion related to the applicability of international humanitarian law (whether Hague regulations, or Geneva Conventions)[56] fits perfectly in this context. Positivists would then rather suggest applying military orders that are adopted according to procedures and by the authority of superior norms (Kelsen), or by secondary rules (Hart). Even when a prominent Palestinian scholar, such as Raja Shehadeh, argues convincingly that Israel, through its military orders, went beyond its powers as occupying authority in international law of occupation,[57] it seemed that he is also using the same positivist/Kelsenian approach. Similarly the discussions towards the Israeli use or misuse of British mandate emergency regulations,[58] or about the applicability of Geneva Conventions,[59] international human rights conventions,[60] fits also within this positivist paradigm.[61]

For Israel, maintaining the "Rule of Law tout court" was clearly of concern, from the very first days (it is often not so in practice, but the intention and tendency seems to be there, at least since the 1980s). The two declarations that followed the first one cited earlier are in fact a possible example: Proclamation No.2 states the assumption by the Area Commander of all

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[54] Shehadeh argued: "Perhaps the single most empowering order issued by the area commander, by which the commander assumed all legislative, executive, and judicial powers, is Proclamation No.2. This order was issued on the first day that the Israeli army occupied the West Bank. Having assumed the power to legislate without consultation in any form with the people to whom the legislation would apply, the Israeli commander became very prolific. Over forty orders of major importance were issued before the end of the first month of occupation." (Shehadeh, The Legislative Stages of the Israeli Military Occupation 1992, 152).

[55] (Ben-Naftali, Gross and Michael, Illegal Occupation: Framing the Occupied Palestinian Terrority 2005, 610).

[56] For a discussion, *see* (Hassouna 2001), (Imseis 2003)

[57] See for example discussion with regards to administrative detention, (Shehadeh, Occupier's Law: Israel and the West Bank 1988, xi); (Rishmawi 1989). Other scholars inquires the respect of international humanitarian law by Israel, *see* (A. Cohen 2005); (Ben-Naftali, Gross and Michael, Illegal Occupation: Framing the Occupied Palestinian Terrority 2005).

[58] For a discussion, *see* (Farrell 2002-2003, 874-5)

[59] Insert discussion about the applicability of Geneva according to initial military orders.

[60] *See generally* (Harris 2008).

[61] (Shehadeh, Occupier's Law: Israel and the West Bank 1988, xiv).

powers,[62] and, Proclamation No.3 created military courts.[63] Interestingly, as the Geneva conventions were supposed to apply, they were later on deleted, again, by a successive military order, and defended based on positivist approach to international law.[64] Emma Playfair pointed out: "The military government invariably seeks to defend its actions in the Occupied Territories with reference to legal provisions of principles, whether international or local law." [65] A similar attitude is also present whenever discussion about the occupation power to change local legal system,[66] and local judicial system.[67] Similarly, many of Fuller's principles would have been satisfied if the Israeli military Area Commander followed the guidelines present in the "Manual for the Military Advocate in Military Government", prepared in fact for that same purpose.[68]

Waldron's insistence on the concept of "Rule of Law as procudre" will take him to consider the way justice is administered, not only by Israeli military courts but by the Palestinian local courts themselves,[69] and the responsibility of the Israel, as an occupation authority.[70] It is in that sense that I understand the insistence of many scholars and human rights activists to ensure protection of Palestinians and the application of "due process" to their proceedings. It is also in that sense that I understand the preoccupation of Palestinian lawyers about the situation in which justice is administered in the territories under Isareli control. As a matter

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[62] For a discussion, *see* (Farrell 2002-2003, 882).

[63] (Farrell 2002-2003, 879).

[64] (Shehadeh, Occupier's Law: Israel and the West Bank 1988, xi). For more about those military orders, *see* (Kassim 1984, 29-30).

[65] (Playfair 2003, 205).

[66] *See for example* (Benvenisti 1992).

[67] (Shehadeh, The West Bank and the Rule of Law 1980); (Shehadeh, Occupier's Law: Israel and the West Bank 1988); (Shehadeh, The Legislative Stages of the Israeli Military Occupation 1992).

[68] Such a manual for example provided that every enactment "must be drawn un in Hebrew and Arabic", shall "not come into force until published in written form", "must be published in an official series available to everyone", "no retrospective legislation was permitted", etc. *See* (Shamgar 1982, 30-1).

[69] For more about changes introduced to Palestinian Judicial System, *see* (Kassim 1984, 30-31).

[70] "There is a widespread corruption amongst the judges, who are appointed by the military authorities, and the police refuse to cooperate with the courts in ensuring that the accused or witnesses are brought to court or that the decisions of the courts are executed." (Shehadeh, Occupier's Law: Israel and the West Bank 1988, 7). "Shehadeh argues that the Israeli military government has effectively subjugated the Palestinian courts by controlling the judges and by removing significant categories of cases from their jurisdiction." (Quigley, Review: West Bank: Israel's Abuse of Law 1981, 120).

of fact, it seems that the intervention of the Israeli Supreme Court in several cases related to the Palestinians,[71] fits perfectly within this conception of "Rule of Law as procedure".

It is possible to show that the Israeli military orders have failed to establish such a system in which justice is administered in the way envisaged by the "Rule of Law as procedure".[72] The same fact that the law giver is the same judge undermines the possibility of realizing such an enterprise, despite the fact that Military Courts as such were established.[73] Similarly, Israel maintained police power, and the enforcement of courts' decision would depend on the military willingness to do so. Israel made use of security justification to exercise extensively and pervasively.[74]

Nonetheless, it is possible in abstract to envisage the possibility of ameliorating the way justice is administered under Israeli occupation in order to meet criteria set out by "Rule of Law as procedure". It is in that sense that I perceive the establishment in the 1980s of a "Civilian Administration" which institutionalized the civilian and military functions of the military government of the West Bank and Gaza Strip.[75] Such creation also resulted in converting military orders, from security measures, to essential part of the law of the land. The Area Commander gave the Head of the Civilian Administration the power to proclaim subsidiary legislation.[76] It is in that sense that I understand the acceptance of the Israeli High Court to hear petitions from Palestinian subjects.[77] It is in that sense too that I perceive changes in the way military courts functioned through time, and the attitude of Palestinian lawyers towards dealing with them at the first place.[78] At the same time, the Palestinian

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[71] Concerning the jurisdiction of the development of Israeli Supreme Court case law in civil cases, *see generally* (Karayanni 2009). While in many cases, the Israeli Supreme Court declined to subject Israeli government policies – such as the "targeted preemptive killings" – deeming it to be non-justiciable. (Ben-Naftali and Michaeli, 'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings 2003, 235)

[72] *See generally* (Paust, Glahn and Woratsch 1990)

[73] "Judges in [Israeli Military] courts are Israel army officers (one with legal training, two without). The principal function of these courts is to try security offences, but they have jurisdiction over all criminal cases and do take some non-security cases, too." (Quigley, Review: West Bank: Israel's Abuse of Law 1981, 120).

[74] (Shehadeh, Occupier's Law: Israel and the West Bank 1988, 9).

[75] (Shehadeh, Occupier's Law: Israel and the West Bank 1988, 69-70).

[76] Order 947, cited in: (Shehadeh, Occupier's Law: Israel and the West Bank 1988, 88).

[77] *See generally* (Karayanni 2009).

[78] For more about Israeli Military Court, *see generally* (Hajjar, Courting Conflict: The Israeli Military Court System in the West Bank and Gaza 2005).

Authority may fail this test of Rule of Law as Standard, for the way justice is administered and the reticence of adopting a Judicial Law and the Basic Law itself (until 2002). Similar critics were raised by Human Rights Organizations concerning the establishment of State Security Courts, by Presidential Decree (later on abolished).[79]

V. Rejecting Formal Conceptions of the Rule of Law

The formal conceptions of the Rule of law do not provide an adequate tool for deciding on the nature of military orders, and the attitude towards them. Besides, such analysis is unsatisfactory because the above insights did not deal with the substance but only with the form of rules. A positivist approach to the rule of law is incapable of explaining the original sin of the new legal system, and the possibility of building legality over an illegal act of occupation.[80] The Rule of Law as Legality cannot escape recognizing a colonial law, or an apartheid law, whenever the standards of the inner morality of law are respected. Finally, even the Rule of Law as Procedure is incapable of dealing with 'justice' administered under occupation, the opposite of justice.[81] Indeed, there seems to be no reference to a particular content of those rules, to the legitimacy of the law giver, and to the goals that are realized by them.

For a Palestinian jurist (whether judge or lawyer),[82] it seems absolutely absurd to be neutral towards those enactments, simply because, as he may rightly observe, such military enactments are often used to realize colonial objectives, rather than Palestinian people's

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[79] For a discussion of the State Security Courts, and critiques of Human Rights Organizations, *see* (Hajjar, Law against Order: Human Rights Organizations and (versus?) the Palestinian Authority 2001, 72-5).

[80] About the illegality of occupation, *see generally* (Ben-Naftali, Gross and Michael, Illegal Occupation: Framing the Occupied Palestinian Terrority 2005);

[81] Even the role of Israeli High Court of Justice may lead to undermining the fact of occupation. As pointed out by Martti Koskenniemi: "The acceptability of the use of discretion by a law-applying institution such as the Israeli High Court of Justice is based on the assumption that its preferences and moral sensibilities are broadly reflective of the preferences and sensibilities of the community in which it exercises its jurisdiction. When jurisdiction is exercised in conditions of occupation, however, such consensus cannot be easily presumed. On the contrary, recourse to moral pathos by an institution of the occupying power will appear to normalize its jurisdiction and add an element of hypocrisy to the felt illegitimacy of its possessing jurisdiction in the first place. Moreover, it will undermine the moral and political significance of the fact of the occupation, even diminishing the urgency of bringing it to an end." (Koskenniemi 2008, 13) (emphasis omitted).

[82] Although I dealt in this paper with those questions from the perspective of a Palestinian judge, similar questions can be raised with regards to legal responsibility and moral obligation of Israeli soldiers and officials to obey Israeli military orders. *See generally* (Osiel 1998).

interest: land is expropriated from Palestinians,[83] where Israeli settlements are built instead,[84] water rights largely curtailed,[85] houses are demolished,[86] Palestinians are detained administratively,[87] targeted and killed without process.[88] It is also by military orders that freedoms (of movement, of religion, of the press, of opinion, and so on) are restricted.[89] It is through military orders that persons are denied re-entry to the West Bank and Gaza Strip,[90] access to East Jerusalem,[91] families are separated,[92] Palestinians denationalized,[93] workers denied access to their place of work, farmers to their land, and students to their schools.[94]

In other words, the three formal conceptions of the Rule of Law do not seem to deal with the core issue. Such conceptions of the Rule of Law, on the contrary, simply facilitated Israeli control of the Palestinian population and Palestinian land.[95] It provided the

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[83] "However, it remains the preference of all Israeli authorities that land acquisition be carried out by "legal" means. The determination of the legality or illegality of an action can be arrived at only in relation to a legal framework." (Shehadeh, Occupier's Law: Israel and the West Bank 1988, 42). "Despite the dubious international legality of the changes made to the laws in force in the West Bank, it is these laws which Israel utilizes to transfer ownership of land from Palestinian to Jewish hands. When the legality of Israeli practices in this sphere is challenged, the legality or illegality is determined according to the legal order imposed by Israel since it has been occupying the West Bank." (Shehadeh, Occupier's Law: Israel and the West Bank 1988, 43)

[84] *See generally* (Quigley, Living in Legal Limbo: Israel's Settlers in Occupied Palestinian Territory 1998); (Jiryis 1985); (Ben-Naftali, Gross and Michael, Illegal Occupation: Framing the Occupied Palestinian Terrority 2005, 579-88).

[85] *See generally* (Dillman 1989); (Scobbie 1994-1995);

[86] For a discussion of Israeli practice of house demolitions, (Farrell 2002-2003); (Halabi 1991);

[87] *See generally* (Rishmawi 1989).

[88] *See generally* (Ben-Naftali and Michaeli, 'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings 2003)

[89] Through military orders, "Israeli military government […] imposed on [the Palestinians] long-term curfews that restrict their movement, and censored their newspapers." (Quigley, Review: West Bank: Israel's Abuse of Law 1981, 119).

[90] *See generally* (Khalil, Irregular Migration into and through the Occupied Palestinian Territory 2009).

[91] For more about the status of East Jerusalem under international law, (Tulman 1997); (Cassese 1986); (Hirsch 2005).

[92] *See generally* (Quigley, Family Reunion and the Right to Return to Occupied Territory 1992); (Khalil, Family Unification in the Occupied Palestinian Territory 2009).

[93] *See generally* (Kattan 2005).

[94] Most recently the building of the separation wall has aggravated the situation in the day-to-day life of Palestinian population of the West Bank. For opinion of the International Court of Justice concerning the "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory", issued on July 9, 2004, see summary of the opinion available at: http://www.icj-cij.org/docket/files/131/1677.pdf

[95] Bisharat argued convincingly that this is the case with acquisition of land. He argued that "the occupation administration's strategy in acquiring Arab land in the Occupied Territories has been, in its reliance on law,

occupation power with a very sophisticated tool, law and legality, to realize what may be considered as basic rights of the Palestinians, as a people or as individuals. Besides, the Palestinian Authority legislated statutes may easily fail such a test set out by a formal conception of the Rule of Law, at least as a theoretical possibility. For Palestinian jurists the formal conceptions of the Rule of Law are simply not enough to differentiate substantially between legislated statutes and military orders.[96]

The formal conceptions of the Rule of Law seem to tell only half of the story. They do not tell us much about the rationales that justified at first place, the imposition of limitation or at least the imposition of certain restrictions on the law giver in the exercise of his main power to legislate, to *create* positive law. Departing from this insight, one may wonder, how can it be possible to read Fuller's insistence on the principle of the legality and use it as if it was simply an argument of technicalities of the way rules ought to be in order to be capable of being followed? Isn't it necessary to read that theory on the light of Fuller's understanding of what the law is and why it is so? "Every departure from the principles of the law's inner morality", to put it in Fuller's same words, "is an affront to man's dignity as a responsible agent." In other words, it seems that Fuller, for didactical purposes distinguished inner morality of law from external morality of law.[97] For that reason, is it possible, without undermining the whole enterprise of having moral law, to separate between internal and external morality of law?

Similar arguments can be said towards positivist conception of law as law. Isn't in the name legal certainty and predictability – thus avoiding to fall in the trap of rulers' whims – that positivists insist on their "Rule of Law tout court", rejecting any interference from outside the domain of the law? Isn't it the insistence on protection of individuals from arbitrary use of power that insistence on fair procedures in the administration of justice could be justified

consistent with the approach taken to land acquisition in Israel proper." (Bisharat, Land, Law, and Legitimacy in Israel and the Occupied Territories 1994, 526). In his many books and articles, Shehadeh provides different examples of how Israel used law to annex Palestinian land and expel Palestinian populations. *See for example* (Shehadeh, Occupier's Law: Israel and the West Bank 1988, 4-5).

[96] Some even called the system with the opposite of Rule of Law (Mis-Rule of Law), *see* (B. Cohen 2001) referring to Israeli legal system's failure to prevent such atrocity to be exercised in the occupied territories; and (Emon 2003) referring to destructions effectuated by Israel of civil institutions, its settlement's policy, and its destruction of Palestinian economy.

[97] *See* (Fuller, The Morality of Law, Revised Edition 1969, 153).

at first place?[98] Those and many other values, implicit to the Rule of Law, make it a fragile and contested ideal, but still attractive and crucial ones, "one of the most important political ideals of our time."[99]

VI. Law, Freedom and Rights

In the beginning, I admitted that there is a connection between the values embedded in the rule of law and the concept of law, now it is time to look at those values. Both military orders and legislated statutes are indeed human made laws, thus, positive in nature. "Positivity is partly a matter of what law is: it is human, it is contingent, [and] it is the product of historical process."[100] As such, law is a mode of governance, it is accordingly susceptible to change and modification. Most importantly, the idea of law conveys an elementary sense of freedom, because the norms we are governed by could be simply different.[101]

But how can freedom co-exist with law, which is, by definition, restriction on freedom? Montesquieu may answer with one simple word: liberty. That is the "power of doing what we ought to will, and in not being constrained to do what we ought not to will."[102] Such a liberty is fragile, and cannot exist when there is an abuse of power. Montesquieu concluded that liberty exists (i.e. freedom from abuse of power) only when powers are separated, and when power checks other power.[103] This makes his ideal type of the "Constitution of Liberty" possible.[104]

As a mode of governance, law, especially positive law, is strictly connected to the government, which is "an art whereby a civil society of men is instituted and preserved upon the foundation of common right or interest" or "the empire of laws and not of men".[105] For Harrington, a government for a nation is similar to the soul for a man. The virtue of

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98 For a discussion about those needs implicit in the discourses of rule of law, *see* (Waldron, The Concept and the Rule of Law 2008, 6-7).

99 (Waldron, The Concept and the Rule of Law 2008, 3).

100 (Waldron, The Concept and the Rule of Law 2008, 30).

101 (Waldron, The Concept and the Rule of Law 2008, 31).

102 In chapter of his "The Spirit of the Laws" (1748), *see* (Montesquieu 1777, 196).

103 (Montesquieu 1777, 197).

104 (Vile 1967, 93).

105 (Harrington 1656).

government is law (equivalent to reason for a human being, not passion). Since human soul can give up its will either to reason or to passion – the one leading to felicity and the other to misery – liberty for a man consists in the empire of his reason. Similarly, it is liberty that makes a commonwealth a government of law, not of men. Since it uses rules (the government gives up its will to reason) not rulers' whims (thus giving up its will to passion). The Americans, much earlier than Montesquieu, had reached the same conclusion. To use Madison's words: "ambition" that "counteracts ambition".[106] To explain the genius solution of check and balance, Harrington uses the metaphor of two silly girls willing to divide and share a cake, "you divide" said one of the two girls, and "I will choose".[107]

The idea of freedom, thus of liberty, inherent to the idea of law, limits the government, in that it imposes restrictions on the way sovereign power is exercised. This limitation has sense only if explained by the existence of rights for individuals that are beyond the sovereign power of the government, before it, and independently from it. It is the idea of right, to use Tocqueville's words, that "enabled men to define anarchy and tyranny, and that taught them how to be independent without arrogance and to obey without servility."[108] One of those rights, a basic one, is property. Tocqueville himself, describing what he had witnessed in America, concluded: "As everyone has property of his own to defend, everyone recognizes the principle upon which he holds it."[109]

Interestingly enough, F.A. Hayek picks up this same idea of liberty, central to Montesquieu, and makes it the core of his theoretical construction of the Rule of Law.[110] However he uses this idea exactly to justify the need of abstention of the state from certain domains or areas, which are private, and need to remain so. Hayek's conception of liberty seems to be negative, since it can be interpreted as being the absence of coercion. It is nonetheless connected to individuals' autonomy and independence; i.e. individuals perceived as free agents. Hayek indeed perceives "the recognition of private […] property is thus an essential

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[106] From Federalist n.51 (James Madison), *see* (Hamilton, Ray and Madison 2001, 268).

[107] (Harrington 1656).

[108] *See* chapter 14 of (Tocqueville 1831), available online at: http://xroads.virginia.edu/~HYPER/DETOC/1_ch14.htm.

[109] *See* chapter 14 of (Tocqueville 1831), available online at: http://xroads.virginia.edu/~HYPER/DETOC/1_ch14.htm.

[110] *See* (Hayek, The Constitution of Liberty 1960).

condition for the prevention of coercion,"[111] although not the only one. For Hayek indeed, the rule of law "stripped of all technicalities […] means that government in all its actions is bound by rules fixed and announced beforehand-rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge."[112]

Hayek's conception of the Rule of Law (that I will call, for an issue of convenience, "Rule of Law as Freedom") perceives law in a similar way to the laws of nature that enable individuals to plan their lives accordingly. Predictability of the law, its character as being general, impersonal and stable, etc. become necessary characteristic of the law. This position, if taken to the extreme, means that many (or maybe all) contemporary legal systems may fail the tests of Rule of Law as Freedom. Most importantly Hayek seems to be reticent of using legislated laws, in a way that coerce agents' freedoms. It is in that sense that legislation, even by a democratically elected body, may constitute an obstacle to Hayek's conception of the rule of law. Hayek seems in a sense to be more inclined to encourage the development of law, not planning its creation. He seems to go exactly to reach the completely opposite conclusion of Bentham, who in the name of predictability, considered common law as obscure and customary law as "fiction from beginning to end",[113] which explains his attack on judge-made law, or case-by-case law.[114]

Dworkin's insight at this point becomes crucial. His conception of the Rule of Law is substantive because it seems to favor a commitment to a theory of rights.[115] Whenever a judge needs to decide hard cases, judges do not exercise discretion; rather he/she approaches law integrity[116] (that I will call, for an issue of convenience, Rule of Law as Integrity). In other words, Dworkin seems to be adding a new characterization for that agent that needs to apply the law - whether this agent refers to the individual that needs to abide by the law, and

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[111] (Hayek, The Constitution of Liberty 1960).

[112] (Hayek, The Road to Serfdom 1944, 54), cited in: (Raz 1979, 288). Raz pursued his analysis to show why he thinks that the conclusion that Hayek draws from that, according to Raz, show one of the fallacies of the contemporary treatment of the rule of law: "the assumption of its overriding importance."

[113] (Bentham 1970 (1782), 103).

[114] *See* (Waldron, Retroactive Law: How Dodgy was Duynhoven? 2004, 639).

[115] *See* (Dworkin, Taking Rights Seriously 1977).

[116] *See* (Dworkin, Law's Empire 1986).

of the judge that needs to apply the law. Such free agent as Hayek would insist is also a moral agent. It is maybe this idea of integrity in both legislation (accordingly lawmakers try to make laws morally coherent) and common law (judges try to make laws adjudicatively coherent) that may favor at the same time codification and systematicity in law.[117]

VII. Conclusion: Legislated Statutes and the Rule of Law

The suggestion I made in this paper is that only a substantial conception of the Rule of Law can provide a valid tool for differentiating between both enactments. While rule by military orders by definition fails the tests of Rule of Law as Freedom and as Integrity,[118] the Palestinian Authority commitment to law creation through *legislated* statutes constitute a premise, a necessary one, for the Rule of Law as Freedom and as Integrity.

The law-making through legislated statutes however, is a *sine qua non* of the rule of law. However, legislated statues alone are not enough. On the contrary, the fact that the PLO accepted to maintain military orders unless duly amended,[119] and most importantly, coexisted with Israeli Military Commander in the task of law making,[120] put the Palestinian Authority under a serious risk of committing two extreme, but related, errors: to assimilate with military decrees or to completely disassociate from them. In both cases, the danger is the same; that is to convert legislated statutes exclusively as a tool of social control that serve exclusively to coercing subjects, rather than providing an atmosphere necessary for free agents to exercise their liberties, free of coercion.

The Palestinian Authority, as a law-giver, risks at the same time, two different but intrinsically related tendencies. On the one side, there is a clear tendency to legislate law, as fast as possible, and in as many areas as possible. Hundreds of laws, decree laws, and bylaws were adopted since the establishment of the Palestinian Authority, even before the election of the Palestinian Legislative Council. The risk here is a tendency of the legislature to expand its power, to think that by legislation it is possible to create any law, covering any domain of

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[117] *See* (Dworkin, Law's Empire 1986, 176-86), cited and discussed in: (Waldron, The Concept and the Rule of Law 2008, 44-5).

[118] As pointed out by Lisa Hajjar, "the law was utilized [in the decades of Israeli occupation] to dispossess and disempower rather than protect Palestinians. This fostered skepticism about law's positive possibilities." (Hajjar, Law against Order: Human Rights Organizations and (versus?) the Palestinian Authority 2001, 75). For a discussion about human rights under the Palestinian Authority, *see generally* (Weiner 1995, 819-35).

[119] *See* article XVIII of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 1995.

[120] *See generally* (Weiner 1995, 814-8);

individuals' life, without any restrictions whatsoever. Most importantly, the elected legislative body, may be willing to expand its powers on the expense of the executive or even the judiciary, and outside a principle which is theoretically included as a basis of the Palestinian Authority legal and political system; i.e. the separation of power. The non-sovereign character of the PA "exacerbates the perceived need and tendency to silence critics and repress political opponents,"[121] while at the same time renders accountability under international human rights treaties *de iure* impossible.[122]

On the other side, the Palestinian Authority seems not to exclude the rule by decree neither; accordingly, granting or maintaining a primordial role of the executive, especially the President of the Palestinian Authority. Such a role is entrenched even in a written constitution-like *legislated* text, the Basic Law of 2003. Following the Hamas coup in Gaza in 2007, the declaration of the state of emergency by President Abbas, a technocratic government under Salam Fayyad was formed, and a new era of "rule by decree" was set in motion in the West Bank, surprisingly with the support of the international community, which saw in this situation an opportunity to realize reforms in many domains, including the security governance and public finance.

Those two risky tendencies may appear at first instance as being contradictory, but they are on the contrary, completely coherent. They are the result of the legacies that the Palestinian Authority had inherited; the first one of decades of Israeli occupation that did not come to an end with Oslo, and on the other the legacy of the PLO, a liberation movement. Military orders in fact are adopted by Israeli military "governors (whether personally or by those authorized by them), in their capacity of a law giver, executer and judge, at the same time. Accordingly, all authorities are concentrated in the same person. The PLO itself, although adopted theoretically three branches of government (the Palestinian National Council acting as a Parliament like body, the Executive Committee, chosen from within the Palestinian National Council, serves as a cabinet, and Military Courts), had such a concentration of powers in the chairman of the Executive Committee.

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[121] (Hajjar, Law against Order: Human Rights Organizations and (versus?) the Palestinian Authority 2001, 76). For a discussion of the impact of the character of the Palestinian Authority on protection of human rights, *see* (Aruri and Caroll 1994, 9-12).

[122] *See generally* (Weiner 1995, 795-803);

At the same time (and here is the most relevant distinction in my view, between military decree and legislated status), military orders is about creating law as rules, that leave as less as possible margin of freedom and choice for individuals, that regulate various aspects of social, economic, and political life, in a way that prioritize public order, safety and raison d'état. On the contrary, legislated statutes are interested in putting forward a framework of action, for state agents, and for individuals, to act accordingly, as free and moral agents.

It is my impression, although not in a measure right now to develop it or prove it, that the decades of rule by military orders may have contributed to the creation of this need for social control through regulation of social, economic and political life or at least the perception of it. This leads me to suspect that the decades of occupation somehow contributed to developing authoritarian system in the Palestinian Authority.[123] Not only from the perspective of the authority itself, which undertake a systematic regulation of each aspect of individuals and groups life, but also from the perspective of individuals themselves, whether state agents, who need to apply the law, or individuals, who not only feel, but also demand, and insist in having clear and pre-established *legislated* rules. The result is acceptance and advocacy of formalism and statutory positivism, both dangerous risks for a healthy development and change of law to accommodate changing social needs.

Back to our Palestinian judge of the Court of Ramallah, who does not necessarily doubt whether or not the rules included in the statutes legislated by the Palestinian Authority constitute rules of law, but needs to know whether he is under the moral obligation to obey them. One way of answering this is simply by saying: "sure!" Law, whenever enacted by a legitimate authority, merits our obedience. This attitude is somehow justified,[124] but it is nonetheless still within the same system that we have outlined as dangerous, i.e. authoritarianism.[125] On the contrary, a second answer would be that, even in the case of a

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[123] In a recent article with a significant title "Law against Order," Lisa Hajjar reached a similar conclusion, calling the PA rule as "autonomous authoritarianism" (Hajjar, Law against Order: Human Rights Organizations and (versus?) the Palestinian Authority 2001). For the impact of the inverted process that took place in the occupied Palestinian territories after Oslo and the impact on women rights, *see* (Ludsin 2005).

[124] This is the position of Hannah Arendt who believed that authoritarianism meant obedience to legitimate authority and hierarchy as a matter of acceptance of traditionally constituted, past authority. Cited and discussed in: (Henderson 1991, 390).

[125] The risk is to pass from substantial authoritarianism to formal authoritarianism, in the way distinguished by Lynn Henderson: "Authoritarianism has at least two different meanings: one simply of unquestioning obedience to authority, and one of obedience combined with the use of authority to repress, punish and oppress human beings. Obedience to authority itself might best be described as formal authoritarianism – it is

legitimate authority, the judge, as much as the individuals need to approach law in their capacity of moral agents. Their choice is not the result of arbitrary exercise of discretion that undermines the Rule of Law because it subjected individuals' actions to whims of men. Rather their choice is justified by perceiving law as integrity.

Israel had used law and legality to rule the territories under its control. Using legality contributed largely to maintaining the occupation, illegal itself. Such a system of (Mis)Rule of Law coexisted with oppression, restriction of freedoms, and dispossession of rights. It led to the normalization of the 'exception' in the day-to-day politics.[126] The establishment of a *national* authority, while occupation persisted, led to similar attitudes towards law as means of social control. Largely as a result of Oslo agreements and the nature of the Palestinian Authority itself, public order and security prevailed over freedoms and rights. In times of occupation, laws have spoken; and they have spoken disturbingly loud. They were oppressive and pervasive of all aspects of individuals' lives. For those who live under the heavy burden of those laws, the language is still the same, as much as their mistrust.

solely concerned with the process of identifying authoritative commands or directions and then following them. Substantive authoritarianism, on the other hand, not only entails the process of obeying commands or rules, but also involves oppression and punishment." (Henderson 1991, 390).

[126] For a discussion of the character of international law of occupation as temporary and exceptional, similar to emergency times, *see generally* (Ben-Naftali, Gross and Michael, Illegal Occupation: Framing the Occupied Palestinian Terrority 2005, 605-8).

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